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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION  
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DOCKET NO. SW-02361A-08-0609

IN THE MATTER OF THE APPLICATION OF  
BLACK MOUNTAIN SEWER CORPORATION,  
AN ARIZONA CORPORATION, FOR A  
DETERMINATION OF THE FAIR VALUE OF  
ITS UTILITY PLANT AND PROPERTY AND  
FOR INCREASES IN ITS RATES AND  
CHARGES FOR UTILITY SERVICE BASED  
THEREON.

**STAFF'S REPLY BRIEF**

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") hereby files its reply brief in the above-captioned matter. Staff specifically responds to the closing briefs of Black Mountain Sewer Company ("Black Mountain" or "Company") and Wind P1 Mortgage Borrower L.L.C., doing business as The Boulders Resort and Golden Door Spa ("Resort"). While Staff is not offering a recommendation regarding the closure of the specific plant at issue in this case, Staff nevertheless maintains that the Commission has the authority to order plant closures in appropriate circumstances.

**I. THE COMMISSION HAS BROAD CONSTITUTIONAL AND STATUTORY AUTHORITY TO REGULATE PUBLIC SERVICE CORPORATIONS IN THE PUBLIC INTEREST.**

The Commission's authority over the rates, plant, operations, and service quality of public service corporations is extensive. *See* Ariz. Const. Art. XV, § 3; A.R.S. §§ 40-202, 321, -331, -361. The closing brief filed by the Resort acknowledges these broad statements of regulatory authority, but then dismisses them, arguing that these provisions "fail to specify in any detail what standards of public utility service are reasonable, necessary, and convenient for the maintenance of sewer facilities."<sup>1</sup> The Resort seems to imply that, because the Commission's authority is sometimes couched in broad terms, the Commission lacks the specific authority to require a public service corporation to remove or close portions of its plant. This argument is misplaced.

<sup>1</sup> Resort's Closing Br. at 15.

1 First, the authorities cited by Decision No. 71865 explicitly state that the Commission may  
2 order a public service corporation to undertake specific changes to its plant or facilities.

3 When the commission finds that additions or improvements to or *changes in the*  
4 *existing plant or physical properties of a public service corporation* ought  
5 reasonably to be made, or that a new structure or structures should be erected, to  
6 promote the security or convenience of its employees or the public, the  
7 commission shall make and serve an order *directing that such changes be made*  
8 or such structure be erected in the manner and within the time specified in the  
9 order.

10 A.R.S. § 40-331 (A) (emphasis added); *see also* A.R.S. § 40-321(A) (stating that Commission may  
11 determine appropriate methods for provision of utility service). More explicit statements of authority  
12 over the plant of public service corporations cannot be imagined.

13 Furthermore, even if these statutes were not explicit about the Commission's authority over  
14 the physical plant of public service corporations, and even if the Commission were solely relying  
15 upon its constitutional power, the Commission would nonetheless have the authority to order a plant  
16 closure. The breadth of the Commission's authority is not undermined by the broad language of the  
17 applicable constitutional and statutory provisions; to the contrary, the scope of the Commission's  
18 authority is enhanced by this broad language, as well as by the Commission's status as a  
19 constitutional agency with exclusive authority. *See, e.g., Arizona Corp. Comm'n v. State ex rel.*  
20 *Woods*, 171 Ariz. 286, 830 P.2d 807 (1992). The Commission is responsible for overseeing the rates,  
21 operations, and service quality of a wide range of public service corporations. The framers intended  
22 for the Commission's jurisdiction and authority to be broad, given the extent of its responsibilities.  
23 *Id.* at 291, 812.

24 The Resort next implies that the statutes cited in Decision No. 71865 should be disregarded  
25 because they are "old statutes,"<sup>2</sup> apparently arguing that statutes become feeble with age. However,  
26 the Commission's constitutional and statutory authorities do not have a "shelf life," and do not  
27 disintegrate with the passing of the years.

28 Finally, the Resort argues that the Commission, if it wishes to act in this matter, should enact  
rules to create industry standards, rather than address the specific issues raised in this case by a single

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<sup>2</sup> Resort's Closing Br. at 14.

1 order.<sup>3</sup> The Resort overlooks the fact that *Arizona Corp. Comm'n v. Palm Springs Util. Co.*, 24 Ariz.  
2 App. 124, 536 P.2d 245 (App. 1975)—the very case it cites in support of this argument—sets forth  
3 exactly the opposite result. In that case, the court concluded that the Commission could deal with  
4 specialized issues on a case-by-case approach. *Id.* at 129, 536 P.2d at 250. Other authorities also  
5 recognize that the Commission is not required to act by rule, but may act by individual order. *See*  
6 A.R.S. §§ 40-321(A) (stating that Commission may act by rule, regulation, or order); -331(A) (stating  
7 that Commission may act by order).

8 While Staff is concerned about the closure and removal of used and useful plant, the  
9 Commission has the authority to order plant closures in appropriate circumstances.

10 **II. THE COMMISSION SHOULD NOT EVALUATE THE COMPANY'S REQUEST**  
11 **FOR AN ACCOUNTING ORDER IN THIS CASE.**

12 In its closing brief, the Company has requested that should the Commission fail to order plant  
13 closure, that specific language be included in such an order granting the Company an accounting  
14 order.<sup>4</sup> Specifically, the Company asks the Commission to allow it to book the costs related to the  
15 Superior Court nuisance case so that it may seek recovery of those costs in its next rate case. Staff  
16 believes that the Commission should deny the Company's request for such an order without  
17 prejudice.

18 Although Staff has no position on the merits of the Company's request at this time, Staff  
19 firmly believes that it should not be addressed in this proceeding. The Company has raised the issue  
20 of an accounting order for the first time in its closing brief, after the time for discovery has ended, the  
21 hearing has concluded, and the record has closed. The Company should not be allowed to raise this  
22 new request in the closing phase of this matter.

23 If the Company wishes to file an application for an accounting order, it may do so as a new  
24 application. Staff and other potential parties will then have the opportunity to evaluate the request,  
25 conduct discovery, and file appropriate recommendations from technical personnel. Such a  
26 procedure would provide for more fairness to all parties in evaluating the Company's request.

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28 <sup>3</sup> Resort's Closing Br. at 22.

<sup>4</sup> Company Closing Br. at 11.

1 **III. CONCLUSION.**

2 Staff has not offered a recommendation on the merits of this difficult case. The record  
3 contains factors that fall on both sides of the debate: complaints about ongoing and noxious odors  
4 versus the specter of ordering the closure of used and useful plant. The Commission has the authority  
5 to order plant closures, although a required closure of used and useful plant would be unusual. Staff  
6 also recommends the Company's request for an accounting order be denied without prejudice, should  
7 the Commission fail to order plant closure.

8 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of June, 2012.

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